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a parenthetical trip to Baltimore, he would be safe until he got off the Banks of Newfoundland? The answer to this is succinctly given by Chief Justice Lowrie, in *Winter vs. Ins. Co.*, 30 Penn. St. 339: "It is not essential to perform the whole voyage; the less of it the better for the insurer."

These considerations show that the distinction between a change of the terminus of a voyage and a change of its course, at least as respects this particular point, is entirely artificial, and founded in no obvious reason. And even if it could be sustained, it would be productive of more practical inconvenience than benefit. It would require in every case an investigation into the intentions and motives of the insured or his shipmaster, during the voyage, which would be difficult and often fruitless, for it would go hard, if he who must be best aware of those intentions and motives, could not discover, when the pinch came, that it was always his design to wind up the deviation, by however circuitous a

course, at the original port of destination. On the other hand, that by which alone the insurer can be really affected, an actual deviation from the proper course of the vessel, is a physical fact which can be ascertained with ease, and readily proved.

For reasons such as these, it is urged by Mr. Phillips and others, that the doctrine of *Lawrence vs. Ins. Co.*, above cited, from its greater simplicity, convenience, and good sense, is to be preferred to that of the English Courts on the subject. The arguments and authorities by which the latter is supported, are fully and carefully stated in the foregoing opinion of Mr. Justice Dewey, and we shall not attempt to weaken them by repetition. We may observe, in conclusion, that the actual decision in the case proceeds on a distinction which may be considered to reconcile the authorities to some degree, and which, at any rate, is ingenious, and forcibly sustained.

H. W.

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*In the Supreme Court of Errors of Connecticut—Sept. Term, 1860.*

BOWMAN vs. FOOT.

Our statutes with regard to the recovery of leased premises, except in the specific remedy which they provide and the notice to quit prescribed, do not dispense with the requirements of the common law on the subject.

A lease for a term of years, under which the rent was payable quarterly on certain days named, contained the following condition:—"Provided however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and the same possess as of his former estate." Held,

1. That the terms *expire and terminate* were merely equivalent to the more common expression, *shall become void*.

2. That the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor.
3. That to take advantage of his right to avoid the lease, it was necessary for the lessor—1st. To make demand of the rent on the day it fell due, on the premises, and at a convenient hour before sunset. 2d. Upon neglect to pay the rent, to make a re-entry on the premises, or in some other positive manner assert the forfeiture of the lease. [Per STORRS, C. J., and HINMAN, J.; ELLSWORTH and SANFORD, Js., dissenting.]

Whether, after an entry for non-payment of rent, the acceptance of the rent is a waiver of the forfeiture: *Quere*. The current of authorities is against such a doctrine.

Writ of error from the judgment of a justice of the peace, upon a summary process brought by the present defendant for the recovery of certain premises leased to the present plaintiff. The writ of error was brought to the Superior Court, and by that Court reserved for the advice of this Court. By the bill of exceptions allowed by the justice, and upon which the only questions in the case arose, the following facts appeared.

The lease under which the defendant in the original suit held the premises, was (so far as important to the case) as follows:

“This indenture, made by and between Enos Foot of the first part, and William F. Bowman of the second part, witnesseth, that the said party of the first part has leased and does hereby lease to the said party of the second part, the house and premises known as the Assembly House, in the city of New Haven, on the corner of Court and Orange streets, for the term of three years from the first day of April, 1858, for the annual rent of five hundred and fifty dollars, payable in quarter-yearly payments of one hundred and thirty-seven  $\frac{50}{100}$  dollars each, to wit: on the first days of July, October, January and April, in each year.

“And the said party of the first part covenants with said party of the second part, that he has good right to lease said premises in manner aforesaid, and that he will suffer and permit said party of the second part, (he keeping all the covenants on his part, as hereinafter contained,) to occupy, possess, and enjoy said premises during the term aforesaid, without hindrance or molestation from him or any person claiming by, from, or under him.

"And the said party of the second part covenants with the said party of the first part to hire said premises, and to pay the rent therefor, as aforesaid. \* \* \* \*

"*Provided however*, and it is further agreed, that if said party of the second part shall neglect to pay the rent as aforesaid. \* \* \* then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate.

"And it is further agreed between the parties hereto, that whenever this lease shall terminate, either by lapse of time or by virtue of any of the express stipulations therein, that said lessee hereby waives all right to any notice to quit possession, as prescribed by the statute relating to summary process. \* \* \*

"And this agreement in writing is, at all times during the period the lessee shall occupy said premises, to be referred to as evidence of the conditions, stipulations, and agreements under which he occupies the same."

It was found by the court that there was due to the plaintiff from the defendant, as rent under the lease, on the first day of April, 1859, the sum of \$137.50, and that the defendant did not, in fact, pay this sum on that day. On this point the court found more particularly, that, on the first day of April the plaintiff had an interview with the defendant, in which the parties conversed about the rent and about the payment of a certain note for \$400, then due from the defendant to the plaintiff, and that the plaintiff did not then, in fact, waive the payment of the rent at that time, or excuse the defendant from the immediate payment thereof, but that the defendant understood the plaintiff in that conversation expressly to excuse him from such immediate payment, and to consent that he might pay the rent at a subsequent day; and the Court found that, in consequence of such understanding, the defendant omitted to pay the rent on that day. The Court further found that, on the 4th day of April, 1859, and before suit was brought, the defendant tendered to the plaintiff, as rent, the sum of \$150, and that the plaintiff accepted it as rent to April first, and gave a receipt therefor

on account, but that the plaintiff, in accepting it, did not expressly waive any right which he then had (if he then had any) to prosecute and maintain his suit, but, on the contrary, then expressly declared that he did not waive any such right.

The plaintiff claimed, upon the facts so found by the court, that the law was so that the defendant had, within the legal intent and meaning of the lease, "neglected" to pay the rent on the first day of April, and that, consequently, the lease did on the same day expire and terminate; but the defendant contended that upon the facts the law was so, that he did not, within such legal intent and meaning, "neglect" to pay the rent. Upon this question of law the court sustained the claim of the plaintiff, and held that, upon the facts so found, the defendant had "neglected" to pay the rent, and that consequently the lease did, on the 1st day of April, 1859, expire and terminate.

The plaintiff in error assigned as errors—1st. That the justice held that the right to insist on the forfeiture for non-payment of the rent due on the 1st of April, 1859, had not been waived by the subsequent acceptance of the rent on the 4th of April, 1859; and 2d. That the justice held that the lease was determined on the 1st of April, 1859, by the non-payment of the rent due on that day, when no demand had been made for the rent.

*Doolittle and Bronson*, for the plaintiff in error.

*C. R. Ingersoll*, for defendant.

The opinion of the Court was delivered by

STORRS, C. J.—We do not find it necessary to decide whether, by the acceptance of rent which fell due before the alleged determination of the lease, the lessor waived his right to repossess himself of his estate. The current of authority is against such a doctrine, although the opposite view of the law is not wholly unsupported. *Coon vs. Brickett*, 2 N. Hamp. 163. It is generally maintained that an entry for condition broken ought not at all to affect the right to receive payment of a pre-existing debt, or the acceptance of payment of such a debt to affect the right of entry.

Nor do we determine whether the effect of such an acceptance can be qualified by a landlord's declaration, at the time of the acceptance, that he does not thereby mean to waive any right. High authority sanctions the idea that the acceptance of rent accruing after condition broken, is in law a waiver of the forfeiture, and not evidence of such waiver merely. It has also been said by judges of great eminence, that the right of the party who pays money to control its application, constrains the lessor who receives rent, tendered as such, to waive his claim of forfeiture.

The only point which we propose to settle as the law of the present case, is that upon the facts stated there was no legal determination of the lessee's estate.

Our statute of summary process recognises no other termination of leases than such as is effected by force of the contract itself. It supersedes none of the common law remedies of the landlord, except in respect of the notice to quit and the form of procedure by action. It follows, that the question whether the tenant's rights have ceased must be settled according to a common law interpretation of the instrument of demise. In some States, precise legal consequences are annexed by statute to the non-payment of rent, and the lessee is arbitrarily divested of his estate. Our statutes contain no such provision.

The lease in evidence was for three years, ending on the first day of April, 1861. It contained a covenant of quiet enjoyment for the full term, with a qualification thus expressed:—"he [the lessee] keeping all the covenants on his part." One of these covenants was for the payment of a quarterly rent upon certain quarter days named. In a subsequent part of the instrument is a proviso of the following tenor: "Provided, however, that if the lessee neglects to pay the rent, &c., then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate." Again, the parties agree that so long as the lessee's occupation continues, (referring to a holding over by consent,) the written agreement shall be evidence "of the *conditions*, stipulations and agreements under

which he occupies." It will be observed that the draughtsman of the contract designs to make use of technical language; and we have, in the first place, the clearest expression of a *condition* annexed to the covenant for the tenant's peaceable enjoyment of estate. Next, we have the correct commencement of a condition—"provided however"—in the very stipulation which is said to terminate the lease, and we have, at the close of the stipulation, a re-entry clause—the apt formula to indicate how a forfeiture is to be enforced: Best, C. J., in *Willson vs. Phillips*, 2 Bing. 13. Last of all, we have an explicit reference to the "conditions" of the instrument by that very name. It was the clear intent of the parties, whatever they may have supposed to be the legal consequences in detail of such a stipulation, to attach to the demise a condition for the lessor's benefit, upon the breach of which he was authorized to compel the tenant to submit to a forfeiture of his tenancy.

The legal interpretation of the instrument agrees with this manifest intent. There is no peculiar significance to the words "shall expire and terminate." They mean just as much, and just as little, as would the more common phrase, "shall become void," if inserted at the same place. Indeed, it appears that both terms were employed together in a lease, the construction of which was the subject of determination in the case of *Jackson vs. Harrison*, 17 Johns. 66. It was there provided, that in case the rent should not be paid "it should be lawful for the lessor to re-enter," &c., and that "the lease and estate thereby granted should cease, determine, and become utterly void, if the lessor should elect so to consider it." It is well understood, that such expressions as these in leases for years do not designate the non-payment of rent as an event, like a death or a marriage, at the date of which an estate shall cease at all events. If so, it would be in the power of the tenant, whenever his leasehold property became unprofitable or onerous, to relieve himself at any pay-day of his duty to retain it, by simply violating his own covenants. Such a construction would be a plain perversion of the intent of the parties. Accordingly, such stipulations are now universally taken to be for the advantage of the landlord.

"Void" means "voidable at his election:" *Jones vs. Carter*, 15 Mees. & Wels. 718. "Expire and terminate" is also an elliptical phrase, meaning "expire and terminate at the lessor's option." This principle of construction leaves us nothing to do with a distinction, which is said to prevail between freehold interests and leases for years, requiring in one case, and not requiring in the other, an entry or claim to divest an estate wholly void by the breach of a condition. In cases like the present, the estate is not wholly void by reason of a breach. Its avoidance is contingent upon the acts of the reversioner. Compare *Shep. Touch.*, pages 139 and 184; see, also, *Doe vs. Bancks*, 4 B. & Ald. 401. To ascertain the law of the case in hand we must fill up the ellipsis. The lease is to expire and terminate after non-payment, at the option of the lessor, who may then re-enter and annul the tenancy.

This rendering of the contract makes the duration of the lease contingent on the exercise by the lessor of his right to terminate it. To denote how this is to be done, the instrument, fairly read, implies that a re-entry shall take place; the usual technical mode prescribed in such contracts, indicating, in the case of estates less than freehold, not necessarily a literal entry, but some proceeding that should in a significant and decisive manner declare the forfeiture of the lease and assert the landlord's rights.

If a tenant's right is thus voidable only, the option to avoid must be exercised under the contract and according to legal usage. The re-entry clause, at all events, creates a necessity for some positive act of the landlord, to determine his tenant's estate. In construing a lease which authorized the lessor, upon the lessee's neglect to perform his covenants, to enter without further demand and notice, and to dispossess the latter, the Supreme Court of Massachusetts held that, inasmuch as a condition and not a limitation was created by the words employed, the estate of the tenant was not avoided by the neglect, and could only be terminated by re-entry: *Fifty Associates vs. Howland*, 11 Met. 99. Since the present case was decided, we have learned that this doctrine was involved in a decision of the Queen's Bench, *Bishop vs. Trustees of Bedford Charity*, 28 L. Jour. 215, which was afterwards reviewed in the Exchequer

Chamber. The doctrine itself does not appear to have been disputed. The defendants, owners of certain premises, were charged with being also in possession of them, and therefore liable for an injury suffered through their negligent condition. They had been leased for thirty years, subject to a right of re-entry for the non-payment of rent. The lessee failed to pay, went into bankruptcy, and left the occupancy of the premises to his weekly lodgers, who, as such, had of course no estate in them. From these persons the defendants, before the accident, had collected rent, and after it, by a decree of the Court of Insolvency, obtained a surrender of the lease itself. To establish possession in the defendants, the judges of the Exchequer Chamber held that it must appear that they had by re-entry avoided their tenant's lease; that the receipt of rent from the weekly lodgers was no proof of re-entry, as it was consistent with the continued existence of the lessee's tenancy; and that, as no demand was proved, the defendants had not asserted in fact their rights under the re-entry clause, and therefore could not be said to be in possession of their property at the time of the injury.

Where a lease is thus voidable, the landlord's option to avoid it should be exercised at the proper point of time, and in the proper place; and, above all, should be brought home to the tenant's knowledge through some unequivocal act, in order to certify to him that he is absolved from the further performance of a lessee's duties. "Where," to quote Baron Parke, "the terms of a lease provide that it shall be avoided by re-entry, either in the case of a freehold lease or a *chattel interest*, an entry, or what is tantamount thereto, is indispensable."

Assuming, then, that it devolves on the lessor to take active measures to enforce his right of avoidance, we cannot doubt that no such forfeiture should be suffered, as for a breach of duty, unless the performance of the duty is first demanded or requested. This principle is illustrated in a striking manner by the case of *Merrifield vs. Cobleigh*, 4 Cush. 182, where the controversy related to a freehold estate. "Whenever," so ran the covenant, "the grantee shall neglect or refuse to support" a certain fence, "this

deed shall be void." The court held that, until there was a demand upon the grantee to repair the decayed fence, there was no breach of the condition. Yet literally, at the point of time when the grantee passively neglected that duty, his title failed. In the case before us no demand was made for the rent. The conversation of April 1st, 1859, however it was or ought to have been understood, is not claimed to have amounted, even by implication, to such a demand.

To prevent future litigation, and to enable parties to make contracts adapted to the view which we take of the law, we go a step beyond the requirements of the case to speak of the formalities necessary to terminate a lease voidable on the non-payment of rent. We confess that we know of no new rules with which to instruct our judgment in this matter, and naturally adhere to the settled doctrines of the common law.

The case of *Jackson vs. Harrison* was decided by a learned court, and has not been overruled by any of the higher tribunals of the State of New York. The lease in question was for seven years, and provided, as has been stated, for an avoidance and re-entry upon non-payment of rent. The court held that an entry was essential to the forfeiture claimed, and that none could be made without showing a demand of the rent due, upon the last day of payment, on the premises, and at a convenient hour before sunset. "The plaintiff," says Van Ness, J., "equally fails in showing a right of entry, by reason that the defendant did not pay the United States tax, because the indispensably necessary step of making a demand of the defendant within the period required by law in order to create a forfeiture, was not taken." This decision seems to be a true exposition of the common law.

A late New Hampshire case, *McQuesten vs. Morgan*, 34 N. Hamp. 400, in its result, accords with our present conclusion, and involves facts of the same general character.

There is error in the proceedings of the magistrate, and we advise that his judgment be reversed.

In this opinion HINMAN, J., concurred.

ELLSWORTH and SANFORD, Js., were of opinion that our statutes respecting leases had done away with the technical rules of the common law as to getting possession of leased premises, and dissented from the opinion of the Chief Justice.

Judgment reversed.

(1) It has been in general held that the receipt of rent accruing after a breach of covenant by a tenant, which by the provisions of his lease creates a forfeiture of the term, is a waiver by the landlord of his right of re-entry, if he was at the time aware of the forfeiture, but otherwise not, because the act is an affirmance of the existence of the tenancy, and an election by the landlord to treat the lease as still subsisting. *Jackson vs. Brownson*, 7 *Johnson*, 227; *Camp vs. Pulver*, 5 *Barbour*, 91; *Clarke vs. Cummings*, Id. 339; *Koeler vs. Davis*, 5 *Duer*, 507; *Jackson vs. Sheldon*, 5 *Cowen*, 448; *McKeldore vs. Darracott*, 13 *Gratt*, 278; *Dendy vs. Nicholl*, 4 *C. B.*, N. S. 376; *Price vs. Werwood*, 4 *Hurls. & Norm*, 511. In *Croft vs. Lumley*, 5 *Ell. & Bl.* 648; 6 *H. Lds. Cases*, 672; *Ell.*, *Bl. & Ell.* 1069, *Am. ed.*, the question was much discussed. There a lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry; it was held by the Queen's Bench to be nevertheless a waiver of the forfeiture. The judgment was affirmed in the Exchequer Chamber, and in the House of Lords on another ground. But in the latter tribunal it was held by a majority of the Judges consulted, *Crompton, J.*, dissenting, that by force of the maxim *solutio accipitur in modum solventis*, the receipt of the rent operated as a waiver of the forfeiture in respect to such breaches as were known at the time. *Erle, J.*, went farther, and held it to be a waiver also as respects even unknown

breaches, which did not differ in circumstances from those which were known; and *Watson, B.*, held it to be a waiver of all previous breaches. On the other hand, it was the opinion of *Crompton, J.*, that the receipt of the rent was not necessarily a waiver, but that the question was, whether it was in fact received with the intention to waive the forfeiture, and in this *Lord Wensleydale* appeared to agree.

For the converse reason, the mere receipt of rent due *before* the forfeiture, will not be a waiver. *Jackson vs. Allen*, 3 *Cow.* 220; *Hunter vs. Ousterhoudt*, 11 *Barbour*, 33; *Stuyvesant vs. Davis*, 9 *Paige*, 427; *Bleeker vs. Smith*, 13 *Wend.* 533; though the opposite was held in *Coon vs. Bricket*, 2 *New Hamp.* 163. Nor even if after a forfeiture will it operate to relieve from the consequences of subsequent continuance of the original forfeiture. *Jackson vs. Allen*, 3 *Cowen*, 220; *Bleecker vs. Smith*, 13 *Wend.* 533. But where the landlord *distrains* for rent due *before* the forfeiture, with the knowledge of it, it will be a waiver; because that is an act which could only be lawfully done during the continuance of the tenancy. *Jackson vs. Sheldon*, 5 *Bowen*, 448; *Stuyvesant vs. Davis*, 9 *Paige*, 427; but see *McKeldore vs. Darracott*, 13 *Grattan*, 278. On the other hand, after the landlord has taken steps by ejectment to enforce his right of entry, he cannot obtain any relief in equity or at law, which would assume the existence of the tenancy, as by an injunction to prevent the collection of rent by the tenant from sub-tenants; *Stuyvesant vs. Davis*, 9

Paige, 427; or an action to compel the payment of subsequent rent or the performance of the covenants of the lease. *Jones vs. Carter*, 15 M. & W. 718.

(2) There is no doubt, as is stated in the foregoing opinion, that weight of authority is that, under the usual clause of forfeiture, the breach of a condition in a lease does not make it absolutely void, but only voidable at the election of the landlord; and that re-entry, or what is equivalent thereto, must be resorted to by him, to enforce the election. In addition to the cases cited in the foregoing opinion, *Doe vs. Banks*, 4 B. & A. 401; *Rede vs. Farr*, 6 M. & S. 121; *Doe vs. Meux*, 4 B. & C. 606; *Doe vs. Birch*, 1 M. & W. 406; *Doe vs. Lewis*, 5 A. & E. 277; *Clarke vs. Jones*, 1 Denio, 577; *Phillips vs. Chesson*, 12 Ired. 194. But in Pennsylvania, this appears not to be the law; and the breach of condition is held to avoid the lease absolutely: *Kenrick vs. Smith*, 7 Watts & Serg. 47; *Shaeffer vs. Shaeffer*, 1 Wright, 527; *Davis vs. Moss*, 2 Id. 346. But it deserves notice, that the question did not distinctly arise in either of these cases. The first was substantially that of a vendee under articles, so that the landlord had still the legal title. In the second he had present possession for a limited estate; and the third was that of a mining lease, in which the landlord

had a general possession of the land subject to the mining right.

(3) The established rule at common law has always been, that where a right of re-entry is claimed on the ground of a forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, on the most notorious part of the demised premises, at a convenient time before sunset on the day when the rent is due. *Co. Litt.* 202 a; 1 *Williams & Saunders*, 287; *Clun's Case*, 10 Rep. 129 a; *Cropp vs. Hambleton, Co.*, *Eliz.* 48; *Wood & Chevor's Case*, 4 *Leonard*, 180; *Tinkler vs. Prentice*, 4 *Taunt.* 549; *Acocks vs. Phillips*, 5 *Hurlst. & Norm.* 183; and this has been generally followed in the United States. *Conner vs. Bradley*, 1 *How. U. S.* 217; 17 *Pet.* 267; *Jackson vs. Harrison*, 17 *Johns.* 70; *Remsen vs. Concklin*, 18 *Id.* 450; *Jackson vs. Kepp*, 3 *Wend.* 230; *Van Rensselaer vs. Jewell*, 2 *Comst.* 147; *McCormick vs. Connell*, 6 *Serg. & R.* 153; *Stover vs. Whitman*, 6 *Binn.* 419; *Gage vs. Smith*, 14 *Maine*, 466; *James vs. Reed*, 15 *New Hamp.* 68; *Jewett vs. Berry*, 20 *Id.* 46; *McQuester vs. Mergher*, 34 *Id.* 400; *Chapman vs. Wright*, 20 *Illinois*, 120; *Eichart vs. Bargus*, 12 *B. Monroe*, 464; *Mackuben vs. Whitecraft*, 4 *Harr. & John.* 135; *Yale vs. Crewson*, 6 *Ind.* 65; *Phillips vs. Doe*, 3 *Ind.* 132; *Gaskill vs. Tramer*, 3 *Calif.* 334.

H. W.

### *In the New York Court of Appeals.*

CHESTER M. FOSTER ET AL. vs. DENIS JULIEN, APPELLANT.<sup>1</sup>

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the endorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the endorser, to present the note for payment at the maker's former place of residence in New York.

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<sup>1</sup> We are indebted to the courtesy of Judge Davies for the following opinion, for which he will accept our thanks.—EDS. A. L. REG.